Supreme Court, U.S.
FILED
FEB 11 2002
CLERK

(2)

No. 01-887

IN THE

Supreme Court of the United States

FRANK J. WSOL, SR., HUGH M. CORCORAN, ROBERT N. FALCO, NEIL J. LONDON, CHARLES SCHMALZ, PHILLIP STANOCH, AS TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND,

Petitioners,

v.

FIDUCIARY MANAGEMENT ASSOCIATES, INC. AND EAST WEST INSTITUTIONAL SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FIDUCIARY MANAGEMENT ASSOCIATES, INC.

MICHAEL M. CONWAY*
JOHN F. ZABRISKIE
ERIC M. PHILLIPS
FOLEY & LARDNER
Attorneys for Respondent
Fiduciary Management Associates, Inc.
70 West Madison Street, Suite 4100
Chicago, Illinois 60602
(312) 558-6600

* *Counsel of Record*

172257

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

3188

STATEMENT PURSUANT TO RULE 29.6

Respondent Fiduciary Management Associates, Inc. is directly or indirectly wholly owned by Old Mutual (US) Holdings Inc., a non-public company, which in turn is directly or indirectly wholly owned by Old Mutual plc, a public company.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
Reasons for Denying the Writ	1
I. The Fund's "Questions Presented" Incorrectly Describe The Proceedings Below And, In Any Event, Were Waived By The Fund	1
A. Misstatements Permeate The Questions Presented	1
B. In the Lower Courts, The Fund Did Not Argue The Legal Issue Showcased In The Questions Presented	6
II. This Is A Fact-Based Dispute Raising No Legal Issue Warranting Supreme Court Review	7
III. The Seventh Circuit's Decision Does Not Conflict With This Court's Precedent	9
A. The Seventh Circuit's Decision Does Not Conflict With *Mertens*	11

Contents

Page

B. The Seventh Circuit's Decision Is Consistent With This Court's Other ERISA Precedents 14

C. The Seventh Circuit's Decision Does Not Conflict With Supreme Court Precedent Dealing With The Common Law Of Trusts 17

IV. The Seventh Circuit's Decision Does Not Conflict With Decisions From Other Courts Of Appeals 19

V. The Seventh Circuit Properly Affirmed The District Court 22

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

Cases:

Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406 (9th Cir. 1988) 21, 22

Blum v. Bacon, 457 U.S. 132, 102 S. Ct. 2355 (1982) 9

Crites, Inc. v. Prudential Insurance Co., 322 U.S. 408, 64 S. Ct. 1075 (1944) 18, 19

Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 97 S. Ct. 2766 (1977) 9

GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc., 895 F.2d 729 (11th Cir. 1990) 20, 22

Great-West Life & Annuity Insurance. Co. v. Knudson, __ U.S. __, 122 S. Ct. 708 (2002) .. 16, 17, 23

Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 115 S. Ct. 2227 (1995) 24

Harris Trust and Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 120 S. Ct. 2180 (2000) 16, 17

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 119 S. Ct. 755 (1999) 17

Cited Authorities

Page

Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir. 1987) 19, 20, 21, 22

Magruder v. Drury, 235 U.S. 106, 35 S. Ct. 77 (1914) 18, 19

Massachusetts Mutual Life Insurance. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085 (1985) 14, 15

Mertens v. Hewitt Associates, 508 U.S. 248, 113 S. Ct. 2063 (1993) 7, 11, 12, 13, 14, 17, 18, 23

Mosser v. Darrow, 341 U.S. 267, 71 S.Ct. 680 (1951) 18, 19

Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272 (1982) 8

United States v. Carter, 217 U.S. 286, 30 S. Ct. 515 (1910) 18, 19

Varity Corp. v. Howe, 516 U.S. 489, 116 S. Ct. 1065 (1996) 15, 16

Cited Authorities

Page

Statutes:

29 U.S.C. § 1106 14

29 U.S.C. § 1109(a) ..... *passim*

29 U.S.C. § 1132(a)(3) 11, 12, 15, 16

Rules:

Fed. R. Civ. P. 60(b) 2, 3

United States Supreme Court Rule 15.2 1

Other Authority:

STERN, GRESSMAN, SHAPIRO AND GELLER, SUPREME COURT PRACTICE 168 (7th ed. 1993) 13

REASONS FOR DENYING THE WRIT

I. The Fund's "Questions Presented" Incorrectly Describe The Proceedings Below And, In Any Event, Were Waived By The Fund

The Statement of the Questions Presented by the Fund[1] is fatally flawed. First, the Questions Presented incorrectly describe the proceedings below. Pursuant to Supreme Court Rule 15.2, Respondent Fiduciary Management Associates, Inc. ("FMA") objects that the Questions Presented do not accurately reflect what occurred in the proceedings in the United States District Court and in the United States Court of Appeals for the Seventh Circuit. Second, the Questions Presented were not the focus of the proceedings below and are waived.

A. Misstatements Permeate The Questions Presented

The entire premise of the Questions Presented is in the opening line in which the Fund states that the Seventh Circuit "accepted as a fact" that the fiduciary had participated in a kickback scheme with crooked trustees. (Pet. i) This assertion is a serious misstatement. In this case, the District Court conducted a non-jury trial and made extensive findings of fact which exonerated FMA from any claim of breach of fiduciary duty or wrongdoing and negated the very premise underlying the Questions Presented. (Pet. B-1 through B-21) The questions assume the fact that FMA knowingly

1. The "Fund" is the terminology used by Petitioners Frank J. Wsol, Sr., Hugh M. Corcoran, Robert N. Falco, Neil J. London, Charles Schmalz, Phillip Stanoch, and the International Brotherhood of Teamsters Union Local No. 710 Pension Fund to describe themselves in the petition.

collaborated with a "shady introducing broker" (Pet. i), East West Institutional Services, Inc. ("East West"), to pay kickbacks to Fund trustees.

However, the District Court found to the contrary. Specifically, the District Court found, as a fact which is reviewed under the clearly erroneous standard, that there was not "a shred of evidence that FMA ever paid East West a referral fee or that use of East West was a condition of FMA's contract with the fund." (Pet. B-15) The District Court also found there was no "quid pro quo" that FMA use East West to get the Fund's business. *Id. See also* Pet. B-19 ("no referral fees were paid.")

Finally, the District Court concluded that the retention of FMA was not the result of any pressure from the allegedly crooked trustee, as the other Fund trustees, who comprised a controlling majority of the board, made their own independent decisions to hire FMA. (Pet. B-15) The issue of kickbacks to the trustees was never raised at trial, much less supported by evidence at trial.

Following the trial, pursuant to Fed. R. Civ. P. 60(b), the Fund sought a new trial based upon allegedly newly-discovered evidence related to the subsequent criminal prosecution of a dishonest trustee and the principals of East West. The District Court, which was the original finder of fact, reviewed the Fund's proffered evidence of FMA's knowledge of, and participation in, alleged kickbacks to Fund trustees and found it not to be believable. Specifically, the District Court denied two motions for a new trial, finding that the Fund's evidence was not credible (Pet. E-6) and would not have altered the outcome of the trial. (Pet. C-1 to E-7) While the Fund appealed all of these

rulings, the Seventh Circuit did not set aside any of the District Court's findings, whether made at trial or in the denial of the Fund's post-trial motions.

Accordingly, no justification exists for the Fund's representation to this Court in its Questions Presented that the Seventh Circuit "accepted as a fact" the Fund's assertion that FMA knowingly participated in a kick-back scheme. This representation is the opposite of the findings actually made by the District Court. The Seventh Circuit explicitly noted that the District Court had found that FMA had exercised all due care in its dealing with the Fund. (Pet. A-3) Furthermore, the Seventh Circuit upheld the District Court's finding that the Fund received best execution of its securities trades and received the same value for its six-cents-per-share brokerage commission payments as the Fund would have received "in a market free of kickbacks and undue influence." (Pet. A-4) Finally, the Seventh Circuit found that any claim that the Fund failed to receive valuable investment information for its six-cents per share brokerage commission failed for lack of factual proof at trial. (Pet. A-5) In no sense did the Seventh Circuit "accept as a fact" any wrongdoing by FMA.

The Seventh Circuit did hypothesize that even if this were not so and the information supplied in the Fund's second Fed. R. Civ. P. 60(b) motion were credited, the Fund would not prevail. But this assumption in no way disturbed, much less set aside, the District Court's findings of fact that FMA achieved best execution, engaged in no prohibited transactions and acted in the best interests of the Fund at all times. (Pet. B-1 to B-20) For the Fund, in its Questions Presented, to suggest that the Seventh Circuit "accepted as a

fact" that FMA had violated fiduciary duties has no support in the record and fatally taints the Questions Presented advanced in the petition.

The Questions Presented also misstate the Seventh Circuit's legal ruling. In the lower courts, the Fund sought relief only under the first two clauses contained in § 409(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1109(a), relating to (i) losses suffered by a plan as a result of a breach of fiduciary duty, and (ii) profits made by a fiduciary resulting from its use of plan assets. (Section 409(a) is reprinted at Pet. F-15) The Fund never argued the third clause of § 409(a), providing that a fiduciary "shall be subject to other equitable or remedial relief as the court may deem appropriate." *Id.* Accordingly, neither the District Court nor the Seventh Circuit was asked to address whether disgorgement of FMA's management fee was available under the third clause providing for equitable or remedial relief.

As to the first clause of § 409(a), the District Court found as a fact that the Fund suffered no loss (Pet. B-10 to B-11, B-18), and the Seventh Circuit upheld this finding. (Pet. A-4) The Fund acknowledges this. (Pet. 7-8) As to the second clause relating to profits of the fiduciary through use of plan assets, the District Court found that FMA's management fee was reasonable (Pet. B-5), and the Seventh Circuit echoed this finding: "Nor is it contended that FMA's management fee was excessive . . ." (Pet. A-5) The Fund has not disputed this finding either.

The second clause of ERISA § 409(a) provides for recovery of profits if the fiduciary has used plan assets for a personal benefit or has earned a higher profit than it otherwise

would have earned, absent a breach of fiduciary obligation. Since the facts found at trial established that neither of these circumstances, in fact, had occurred, the Seventh Circuit correctly found the Fund had no right to recover profits from FMA. The Seventh Circuit's articulation of two circumstances in which a fiduciary would be liable for disgorgement of profits, *i.e.* if a fiduciary appropriated fund assets or made risky investments of fund assets so as to maximize the fiduciary's fees (Pet A-6), are illustrative of conduct giving rise to recovery under the second clause of § 409(a). The Seventh Circuit, however, did not limit the remedy of recovery of profits to these two examples.

Contrary to the premise of the Questions Presented, the Seventh Circuit never said that § 409(a) as a whole, or even the second clause of § 409(a), applied only in two scenarios. Rather, the Seventh Circuit added a third, flexible scenario under which a plan could recover if the fiduciary annexed a "profit opportunity" and obtained additional profits from "what they would have been had there been no breach of fiduciary duty." (Pet. A-6) But as to this third category, the Seventh Circuit affirmed the District Court's fact finding that this did not occur as to FMA: "There is no evidence that FMA obtained a profit that it would not have obtained but for the alleged breach of its fiduciary obligation." (Pet. A-5)

These serious misstatements about the proceedings below warrant denial of a writ of certiorari as to the Question Presented advanced in the Fund's petition.

B. In the Lower Courts, The Fund Did Not Argue The Legal Issue Showcased In The Questions Presented

Equally important, the Fund never relied upon the third clause of § 409(a), relating to equitable or remedial relief, at any juncture of proceedings in the District Court or Seventh Circuit, although it is the centerpiece of the petition for certiorari. (Pet. 12-19, 21-24)

In the Fund's argument in the District Court in opposition to FMA's motion for judgment on partial findings, the Fund only relied upon the "losses" and "profits" clauses of § 409(a), with not a word about the equitable or remedial relief clause. Specifically, the Fund's attorney identified only two categories of relief under § 409(a) in his legal argument to the District Court:

> And I would refer your Honor to Section 409 of ERISA, 29 U.S.C. Section 1109, which I've handed up a copy of that as well.
>
> And that section provides not one but two ways, two mechanisms, if you will, to establish damages. If a loss is incurred, there are damages. If, under other circumstances, you can obtain profits, those are also damages. (Tr. 903).

A few minutes later, the Fund's counsel again directed the District Court only to the first two remedies under § 409(a) (losses and profits), never raising the third category of "equitable or remedial relief" which is raised so prominently here.

> But refer to 409. There are two different forms of damages there, and the question is can we recover either one of them. (Tr. 905).

In the briefing to the Seventh Circuit, no argument was based upon the third clause of § 409(a). Similarly, the Fund never cited *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063 (1993), so heavily relied upon in the petition, in any of the four briefs filed by the Fund in the Seventh Circuit. Since the Seventh Circuit addressed only the two clauses of § 409(a) raised by the Fund on appeal, the Seventh Circuit did not address, nor had reason to address, the circumstances under which a plan may be entitled to equitable or remedial relief under § 409(a). Moreover, the Fund did not ever make the argument, showcased in its petition (Pet. 15-16), that such equitable or remedial relief is mandatory. It is not appropriate for the Fund to ask this Court to review Questions Presented as to whether any remedy may exist under a clause of § 409(a) that was not raised in the lower courts.

II. This Is A Fact-Based Dispute Raising No Legal Issue Warranting Supreme Court Review

The proceedings below focused on the facts, not the law. As the District Court recognized, the Fund did not dispute FMA's explanation of the governing ERISA legal standards.[2]

---

2. The District Court correctly stated that the Fund bore the burden of proving "a breach of duty, loss, and causal relationship between the breach of duty and the loss." (Pet. B-11) Here and elsewhere (Pet. B-8), the Fund in its appendix erroneously misquotes the Court's ruling by substituting "casual" for "causal."

Specifically, the District Court stated in issuing its ruling in favor of FMA at the close of plaintiff's case-in-chief that while there were "dramatic differences in the analysis of the evidence and inferences to be drawn", there was no dispute between the parties as to the legal elements of each ERISA count. (Pet. B-1 to B-2) This case was, and is, a fact-based dispute. The District Court found the facts in favor of FMA. In the conclusion of its opinion, the District Court stated: "The plaintiffs have not established there was a conflict of interest between East West and the best interests of the fund participants, or that FMA pursued any interests other than the fund participants' best interests when FMA made its investment decisions." (Pet. B-20) The District Court also found that the Fund suffered no loss. (Pet B-10 to B-11, B-18)

The Seventh Circuit did not disturb the District Court's findings of fact that (i) FMA had exercised all due care (Pet A-3), (ii) the Fund had suffered no loss as a result of FMA's conduct (Pet. A-3), (iii) the Fund obtained best execution of its equity trades at the standard market price (Pet. A-4), and (iv) FMA received no profit as a result of any breach of fiduciary duty. (Pet. A-5) In upholding under the clearly erroneous standard the District Court's finding that the Fund did not overpay commissions by using East West, the Seventh Circuit considered not only the evidence adduced at trial, but also "the additional evidence that the plaintiffs presented in their 60(b) motion." (Pet. A-4)

This Court has expressed repeatedly its reluctance to disturb a trial court's findings of fact, which here the Court of Appeals has not set aside. *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S. Ct. 3272, 3278 (1982) ("The Court of Appeals did not hold any of the District Court's findings of fact to be

clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts."). Here the critical factual findings fully and independently support the judgment below.

If certiorari were granted, FMA would rely on this factual record as alternative grounds to support the judgment below. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5, 102 S. Ct. 2355, 2359 n.5 (1982) ("an appellee may rely upon any matter appearing in the record in support of the judgment below.") *See also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419, 97 S. Ct. 2766, 2775 (1977).

III. The Seventh Circuit's Decision Does Not Conflict With This Court's Precedent

Despite the Fund's vain efforts to distort this Court's prior decisions interpreting ERISA, no conflict exists between the Seventh Circuit's decision below and this Court's ERISA precedent. To the contrary, to the extent this Court's prior ERISA decisions speak to the issue decided by the Seventh Circuit, the lower court decision is consistent.

ERISA § 409(a) is one of ERISA's many enforcement provisions. Section 409(a) focuses on the remedies available to a plan when the plan's fiduciary violates a provision of ERISA. Specifically, § 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to [1] make good to such plan any losses to the plan resulting from each such breach, and [2] to restore

> to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary, and [3] shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.[3]

29 U.S.C. § 1109(a) (bracketed numbers added).

Succinctly put, the Fund claims that, assuming FMA did breach its fiduciary duties and engage in prohibited transactions (an assumption not supported by the District Court's factual findings), the Seventh Circuit has incorrectly interpreted the second and third clauses of § 409(a) – the "profits" clause and the "equitable or remedial relief" clause. The Fund asserts that it is entitled to its requested remedy – a judgment equal in amount to the fees FMA earned for performing its investment management services for the Fund – even though FMA never improperly used Fund assets or engaged in risky investments to maximize FMA's fees. (Pet. A-5 to A-6)

The Fund's erroneous argument springs from the false premise that ERISA's purpose and prior decisions from this Court *compel* an ERISA remedy whenever there is an ERISA violation. The Fund phrases this theory in the form of an *"if-then"* proposition – *if* FMA violated ERISA, *then* the Fund is entitled to a monetary recovery under ERISA from

3. Tellingly, when the Fund quoted this statutory provision in its opening brief in the Seventh Circuit, the Fund omitted the language "shall be subject to" in clause 3, substituting ellipses for the absent words. (Fund Br. at 45) Yet these are words which the Fund argues (albeit wrongly) remove the court's discretion in awarding equitable relief and make relief compulsory. (Pet. 15)

FMA. (*See* Pet. 13) The Fund decries the Seventh Circuit's opinion as causing uncertainty, since "[w]here ERISA's broad remedies had once been (seemingly) mandated and unquestionably dispensed, the Seventh Circuit's decision invites reconsideration and engenders confusion on many levels. . . . [and] conflicts in principle with several United States Supreme Court decisions", primarily *Mertens v. Hewitt Associates*, 508 U.S. 248, 261-62, 113 S. Ct. 2063, 2071 (1993). (Pet. 10)

The Fund's contention is meritless. The Seventh Circuit correctly applied existing ERISA law in a manner consistent with this Court's precedent.

A. The Seventh Circuit's Decision Does Not Conflict With *Mertens*

If the Fund had thought *Mertens* to be relevant to the proceedings below, surely the Fund would have cited it at least once in the four briefs the Fund filed in the Seventh Circuit. The Fund never did – not once. Yet in the petition, the Fund cites *Mertens* repeatedly. (Pet. 10, 16, 17-23, 25)

Tellingly, the Fund does not argue that the Seventh Circuit's ruling conflicts with the holding in *Mertens*. Such an argument would be groundless. In *Mertens*, this Court addressed the question of whether ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty.[4] This Court held that

4. Unlike this case, the parties in *Mertens* assumed an ERISA violation had occurred. 508 U.S. at 254, 113 S. Ct. at 2067. Here, the District Court held that no ERISA violation had been proven, and FMA relies upon that judicial finding in this Court.

§ 502(a)(3) does not authorize such suits against nonfiduciaries. This Court rejected the petitioners' pleas that the Court's construction of the statute would leave beneficiaries like petitioners with less protection than existed before ERISA, and would contradict ERISA's basic goal of promoting the interests of employees and plan beneficiaries. 508 U.S. at 261-62, 113 S. Ct. at 2071.

Applying a straightforward statutory analysis, this Court refused to accept petitioners' "strained interpretation" of § 502(a)(3) in order to achieve ERISA's purpose of protecting plan participants and beneficiaries. *Id.* This Court pointed out that ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Id.* Accordingly, this Court held that the "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of [ERISA's] text regarding the *specific* issue under consideration." *Id.* (emphasis in original)

Mertens neither addressed the specific statutory provision addressed by the Seventh Circuit below, nor did it address actions against fiduciaries, as did the Seventh Circuit. Unlike § 502(a)(3) addressed by *Mertens*, § 409(a) addressed by the Seventh Circuit expressly provides for the *type* of relief requested by the Fund, disgorgement of "profits . . . made through use of assets of the plan by the fiduciary . . ." 29 U.S.C. § 1109(a). However, the Seventh Circuit held that the Fund was not entitled to this type of relief based on the facts of the case, as decided in a trial.

Rather than argue a direct conflict between the Seventh Circuit's holding below and this Court's holding in *Mertens*, the Fund makes the more tenuous argument that the lower court opinion "conflicts with the reasoning of *Mertens*."

(Pet. 17) One commentator has noted that a conflict in general principles really is no conflict at all for purposes of the criteria for a grant of certiorari and "any effort to mislead the Court into viewing a conflict in principle as a real conflict is almost invariably futile." STERN, GRESSMAN, SHAPIRO AND GELLER, SUPREME COURT PRACTICE 168 (7th ed. 1993).

Even this contention by the Fund is mistaken, as no "conflict in reasoning" exists between *Mertens* and the courts below. The Fund focuses on a narrow portion of the Court's *Mertens* opinion and then distorts its meaning. While the *Mertens* opinion did not address issues of liability under § 409(a), this Court did briefly mention § 409(a) in the context of discussing the scope and potential liability of fiduciaries under ERISA. This Court stated in pertinent part that under § 409(a), professional service providers who are fiduciaries "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406". *Mertens*, 508 U.S. at 262, 113 S. Ct. at 2071-72. Relying on this language, the Fund claims that "[d]isgorgement of FMA's profits or fees, according to this Court's pronouncement, **must** be ordered. There are no qualifications. There is no discretion." (Pet. 18) (emphasis in original; footnote omitted) To the contrary, this Court's statement in *Mertens* simply reflects the plain language of the profits clause of § 409(a), stating that a fiduciary who engages in a breach of fiduciary duty or prohibited transaction shall restore "any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary . . ." 29 U.S.C. § 1109(a).

The Fund's claim of a conflict between the Seventh Circuit's decision and this Court's decision in *Mertens* is predicated on the false assertion that the Seventh Circuit

assumed FMA's participation in prohibited transactions under ERISA § 406, 29 U.S.C. § 1106. (Pet. 20-21) Not true. While the Seventh Circuit's opinion assumes, *arguendo* only, fiduciary breaches by FMA, the Seventh Circuit makes no mention whatsoever of § 406 or prohibited transactions generally. (Pet. A-1 to A-6) The Fund admits that the Seventh Circuit did not mention § 406. (Pet. 20-21 n.8)

Nothing in *Mertens* required the Seventh Circuit to disregard the plain language of § 409(a) and award a remedy to the Fund. Under *Mertens*, and under the language of the statute, a fiduciary is liable for profits obtained through participation in fiduciary breaches or prohibited transactions. The Seventh Circuit below correctly found that FMA's management fees were earned through FMA's own efforts, not through participation in any alleged fiduciary breaches or prohibited transactions. (Pet. A-5 to A-6)

Contrary to the Fund's position, ERISA is not a free-agent vehicle, with no fixed standard or guideline, to mete out punishment (in the form of transferring wealth from a fiduciary to a pension fund) when the Fund has lost nothing and the fiduciary gained nothing by some alleged misconduct. *Mertens* holds that ERISA strikes a careful balance which is not to be upset by case-by-case expansion of remedies. The Seventh Circuit's opinion in no way conflicts with this holding.

B. The Seventh Circuit's Decision Is Consistent With This Court's Other ERISA Precedents

While the Fund cites other ERISA precedents from this Court besides *Mertens*, the Seventh Circuit's decision is consistent with those decisions. In *Massachusetts Mutual Life*

Insurance. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085 (1985) (Pet. 18), this Court denied a plan participant a remedy under § 409(a) in connection with a fiduciary's alleged breach, finding that a fiduciary's personal liability was to the plan, not to the participant. This Court rejected a "blue pencil" method of statutory interpretation of ERISA, involving the omission of "all words not part of the clauses deemed pertinent to the task at hand". 473 U.S. at 142, 105 S. Ct. at 3090. This is impermissible because it "ignores the relevant context in which statutory language subsists" and results in a "mode of interpretation [that] would render superfluous" some clauses of the section while slighting other language." *Id.* Consistent with *Russell*, the Seventh Circuit below gave effect to the entire language of the two clauses of § 409(a) invoked by the Fund and concluded that the Fund was unable to satisfy § 409(a)'s requirement that profits must be "made through use of assets of the plan" to justify disgorgement.

In *Varity Corp. v. Howe*, 516 U.S. 489, 490, 116 S. Ct. 1065, 1067 (1996) (Pet. 15, 17, 22, 27), this Court found that § 502(a)(3) authorizes a participant to seek individualized equitable relief against a fiduciary for a breach of the fiduciary's obligations. Notably, however, after finding that the plaintiffs were entitled to seek a remedy under the "other equitable relief" clause of § 502(a)(3), this Court reminded the petitioners and courts that the statute authorized only "*appropriate*" equitable relief:

> We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and

> the exclusion of others." *Pilot Life Ins. Co.*, 481 U.S., at 54, 107 S. Ct., at 1556. *See also*, *Russell*, 473 U.S., at 147, 105 S. Ct., at 3092-3093; *Mertens*, 508 U.S., at 263-264, 113 S. Ct., at 2072 Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

516 U.S. at 515, 116 S. Ct. at 1079.

Similarly, in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 120 S. Ct. 2180 (2000) (Pet. 17, 21, 22), this Court, while holding that the "appropriate equitable relief" provisions of § 502(a)(3) authorize an action for restitution of property obtained by a nonfiduciary party who was a party-in-interest to a prohibited transaction, or disgorgement of proceeds and profits by such nonfiduciary if the property has already been sold, nonetheless emphasized that there are "limits" on such actions. 530 U.S. at 250, 120 S. Ct. at 2189-90. Although *Varity* and *Harris Bank* dealt with § 502(a)(3), rather than the § 409(a) addressed by the Seventh Circuit, the Seventh Circuit's decision is in harmony with those opinions by requiring faithful adherence to the statutory language.

Great-West Life & Annuity Insurance. Co. v. Knudson, __ U.S. __, 122 S. Ct. 708 (2002), also demonstrates the absence of conflict between the Seventh Circuit's decision and ERISA precedent from this Court. In *Great-West*, this Court held that § 502(a)(3), which authorizes plan participants and fiduciaries to bring civil actions to obtain "other appropriate equitable relief" to redress violations of a

plan, could not be relied upon to compel a plan beneficiary to make "legal" restitution to the plan for benefits the plan had paid. This Court held that it would be improper for courts to expand "the 'carefully crafted and detailed enforcement scheme' embodied in the text [of ERISA] that Congress has adopted." __ U.S. __, 122 S. Ct. at 718-19 (citing *Mertens*, 508 U.S. at 254, 113 S. Ct. 2063).

C. The Seventh Circuit's Decision Does Not Conflict With Supreme Court Precedent Dealing With The Common Law Of Trusts

The Fund also claims that the Seventh Circuit's decision conflicts with decisions from this Court applying the common law of trusts. This contention suffers from two infirmities. First, as this Court has expressly held, when common law trust concepts collide with the provisions enacted in ERISA, the statutory terms of ERISA prevail. Second, nothing in the Seventh Circuit's opinion contravenes basic trust law principles.

First, the Fund's assertion that "[i]n fashioning 'appropriate equitable relief' under ERISA § 409, a reviewing court must look to general 'principles of trust law' " (Pet. 21) is not accurate. In *Harris Trust*, this Court stated that the common law of trusts "offers a 'starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes.' " 530 U.S. at 250, 120 S. Ct. at 2189 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447, 119 S. Ct. 755, 765 (1999)). Any inconsistent law derived from the common law of trusts must give way. Under § 409(a), appropriate "equitable" relief cannot be interpreted to include the disgorgement of "profits of such fiduciary which have been made through use of assets of the plan" (already provided

for in § 409(a)'s second clause), because that would make this statutory language redundant with the second clause of § 409(a). *See Mertens*, 508 U.S. at 257-58, 113 S. Ct. at 2069 (rejecting interpretation of ERISA that would render language superfluous).

Even if the common trust law cases cited by the Fund were instructive on the interpretation of § 409(a), those cases are not in conflict with the Seventh Circuit's decision below. None of those cases dealt with the situation here, where plaintiffs sought disgorgement of professional fees earned for *bona fide* services provided by FMA to the Fund.

In *United States v. Carter*, 217 U.S. 286, 297-98, 30 S. Ct. 515, 516 (1910) (Pet. 10, 21, 23), this Court ordered a U.S. Army captain who received kickbacks from contractors to whom he directed government business to disgorge those kickbacks. In *Magruder v. Drury*, 235 U.S. 106, 120-21, 35 S. Ct. 77, 82 (1914) (Pet. 21, 23), this Court ordered a trustee of an estate to disgorge commissions received on loans made out of assets of the estate. Notably, however, this Court refused to order disgorgement of commissions earned for services actually rendered to the estate by the trustee. 235 U.S. at 113, 35 S. Ct. at 79-80. In *Mosser v. Darrow*, 341 U.S. 267, 272-73, 71 S.Ct. 680, 682-83 (1951) (Pet. 21, 23, 29), this Court held the trustee of a reorganization trust to be liable for the profits made by trust employees through improper trading in securities of the debtors' subsidiaries. Finally, in *Crites, Inc. v. Prudential Insurance Co.*, 322 U.S. 408, 414-15, 64 S. Ct. 1075, 1079-80 (1944) (Pet. 21, 23), the Court ordered a receiver of mortgaged farms in a foreclosure proceeding to disgorge profits paid to him by a buyer of the foreclosed properties, reasoning that the receiver breached his duty of undivided loyalty to the seller of the properties in receiving compensation from the buyer.

By contrast, here there was no dispute below that FMA's money management fees – which the Fund agreed to in advance – were reasonable. (Pet. A-5, B-5) Nor was there any dispute that FMA provided valuable money management services to the Fund, which earned the Fund tens of millions of dollars. (Pet. B-5) Based on these core undisputed facts, the Seventh Circuit determined that FMA's management fees were not "profits of such fiduciary made through use of assets of the plan" under § 409(a). FMA was not the recipient of any "ill-gotten gains," which the Fund argues that *Carter*, *Magruder*, *Mosser*, and *Crites* proscribe. (Pet. 23-24) Indeed, in *Magruder*, this Court distinguished between reasonable fees earned through services rendered, which fiduciaries are allowed to keep, and ill-gotten gains made through use of plan assets, which must be disgorged. 235 U.S. at 113, 35 S. Ct. at 79-80. It is the former that the Fund claims must be disgorged, but nothing in this Court's precedent interpreting the common law of trust suggests such a result would be proper.

IV. The Seventh Circuit's Decision Does Not Conflict With Decisions From Other Courts Of Appeals

No conflicts exist among the Courts of Appeals either. No Court of Appeals has ordered under § 409(a) the disgorgement of a professional service provider's reasonable earned fees for services rendered on the premise that these fees are illicit "profits" made through use of assets of the plan. Yet this is the unprecedented result sought by the Fund.

One point merits attention at the outset. The Fund argues that three Court of Appeals decisions conflict with the Seventh Circuit below. Yet the Fund only cited one of these decisions, *Lowen v. Tower Asset Management, Inc.*, 829 F.2d

1209 (2d Cir. 1987), in the four briefs the Fund filed in the Seventh Circuit, and the Fund only cited that case once, in a reply brief. If the legal principles of these cases are so closely tied to the issues in this case to create an important conflict among the circuits, the Fund not only would have cited each of these cases, but would have discussed them at length in the lower courts. That never happened.

Of these three Court of Appeals cases, the Fund relies most heavily on *GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729 (11th Cir. 1990) (Pet. 10, 24, 27), which the Fund never cited in the lower courts. In *GIW*, the Eleventh Circuit did not even address the issue of disgorgement of management fees that had been ordered by the trial court. There is no indication in the Eleventh Circuit's opinion that this issue was even raised on appeal. Instead, the Eleventh Circuit reviewed the trial court's award of hundreds of thousands of dollars in losses to the pension fund caused by the investment manager's fiduciary breaches. *Id.* at 733-34. By contrast, here the lower courts found that FMA caused no loss to the Fund, and the Fund no longer resists this judicial finding. Moreover, in *GIW*, the investment manager failed to even "obtain or read relevant Plan documents or the Plan booklet prior to investing" the fund's assets and causing a loss. *Id.* at 731. In a real sense, then, the investment manager in *GIW* never earned its fees. Conversely, FMA's management fees were reasonable, and, in exchange for those fees, FMA provided skilled, professional money management services resulting in a return to the Fund that exceeded the Fund's applicable performance benchmark.

The Fund also claims a conflict between the Seventh Circuit's decision and the Second Circuit's decision in *Lowen*.

(Pet. 10, 18, 25, 27) In *Lowen*, unlike here, the money manager invested the plans' assets in companies in which one or more defendants owned an interest or from which one or more defendants received fees or other consideration. The investments caused the plans to lose $20 million. 829 F.2d at 1211-12. The trial court ordered disgorgement of fees and commissions received by defendants in connection with the investment of the plans' assets in companies in which the defendants had a personal interest. *Id.* at 1214, 1222. Here, FMA invested the Fund's assets in publicly-held securities. FMA's management of the Fund's assets was – and was found in the trial court to be – astute, proper, and profitable for the Fund.

Finally, the Fund asserts a conflict between the Seventh Circuit's decision and *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406 (9th Cir. 1988). (Pet. 10, 11, 19, 23, 25-27) In *Murdock*, plan fiduciaries used plan assets to acquire stock in two companies that one of the defendants controlled. This defendant then manipulated the combined stock holdings to "greenmail" the two companies, and used the "greenmail" to personally profit through premiums paid for the companies' stock. *Id.* at 1408. The Ninth Circuit held that the defendant could be ordered to disgorge his ill-gotten profits. *Id.* at 1418. The facts in *Murdock* have little to do with the facts upon which the Seventh Circuit's decision below was based. The Fund did not contend that FMA caused the Fund to engage in any improper investments from which FMA profited. Rather, the Fund sought and was denied disgorgement of FMA's reasonable, earned management fees. Nothing in *Murdock* would compel disgorgement of those management fees under § 409(a).

Even a cursory examination of the facts and holdings of *GIW*, *Lowen*, and *Murdock* reveals that the Fund's claim of a conflict between Courts of Appeals is ill-conceived.

V. The Seventh Circuit Properly Affirmed The District Court

The Seventh Circuit below correctly rejected the Fund's argument that the management fee received by FMA should be repaid under § 409(a)'s "profits" clause. The Seventh Circuit applied § 409(a)'s "profits" clause in a manner designed to effect precisely Congress's goal of providing a remedy for misuse of plan assets. The Seventh Circuit properly inquired whether FMA had used the Fund's assets for a purpose other than investing on behalf of the Fund or whether FMA invested those funds in a risky fashion to maximize its fee. (Pet. A-6) Because use of East West was the fiduciary breach the Fund alleged, the Seventh Circuit, in a passage from its opinion that the Fund studiously ignores, also inquired whether FMA earned a larger management fee by investing through East West. The answer, based on the District Court's findings, was no. Accordingly, the Seventh Circuit properly affirmed judgment for FMA.

The Seventh Circuit had no reason to consider awarding the Fund relief under § 409(a)'s equitable or remedial relief clause. The Fund did not rely on that clause in either the District Court or the Seventh Circuit[5] and has now waived any argument based on that clause.

---

5. The Fund's assertion that its claim that FMA must disgorge its earned, reasonable management fee "derived" in part from the equitable or remedial relief clause has absolutely no basis in the record. (Pet. 13)

The Fund wrongly argues that the Seventh Circuit had an "independent duty" to award the Fund relief under the equitable or remedial relief clause, even though never asked to do so by the Fund. The authority the Fund cites in support of this proposition (Pet. 22-24) is wrenched out of context and has no relevance to the present circumstances.

Moreover, the Fund's claim that FMA must pay the Fund an amount equal to its fee due to an alleged (and actually disproved) breach of fiduciary duty is not an equitable claim. The Fund has not identified a specific *res* to be recovered, nor has it sought to impose a trust over a specific asset. Rather, the Fund pressed a claim for money. Such a claim for money was described in *Great-West* as a claim for restitution at law. __ U.S. __, 122 S. Ct. 708, 714 (2002).

Further, the Fund admits that its proposed reading of the third clause of § 409(a) would render the second clause superfluous (Pet. 16-17), which is impermissible. *Mertens*, 508 U.S. at 257-58, 258 n.8, 113 S. Ct. at 2069-70, 2070 n.8. If a party is permitted to pursue restoration of alleged profits under the third clause – despite having tried and failed to prove its entitlement to such relief under the second clause – the second clause would be rendered redundant. Similarly, under the Fund's reading, the language of the profits clause requiring restoration of profits "made through use of assets of the plan" would be rendered utterly meaningless. Also, the term "other" equitable relief in the third clause of § 409(a) would be meaningless if it were to extend the same relief as the second clause.

Finally, relief under § 409(a)'s equitable or remedial relief clause is discretionary. The Fund's argument (Pet. 15-16) that "may" means "shall" in the clause "shall be

subject to such other equitable or remedial relief as the court *may* deem appropriate" is nonsensical. 29 U.S.C. § 1109(a) (emphasis added). The operative word, "may," is permissive. Although there is authority from this Court that "shall" could well mean "may," *e.g.*, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9, 115 S. Ct. 2227, 2235 n.9 (1995) ("For example, certain of the Federal Rules use the word 'shall' to authorize, but not to require, judicial action. . . "), the Fund cites no authority to support the converse reading of the word "may."

CONCLUSION

FMA respectfully requests that the Fund's petition for issuance of a writ of certiorari be denied.

Respectfully submitted,

MICHAEL M. CONWAY*
JOHN F. ZABRISKIE
ERIC M. PHILLIPS
FOLEY & LARDNER
Attorneys for Respondent
Fiduciary Management Associates, Inc.
70 West Madison Street, Suite 4100
Chicago, Illinois 60602
(312) 558-6600

* *Counsel of Record*